a

LIM CHOON GHEE

v.

SHARIZAN MD ISA

b

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
MAHADEV SHANKAR JCA
VC GEORGE JCA
[CIVIL APPLICATION NO: K-08-315-95]
4 SEPTEMBER 1995

c

CIVIL PROCEDURE: *Appeal - Leave to appeal - Delay in applying - No reasons given - Effect - Whether application time barred - Whether any merits in appeal*

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The plaintiff, a motorcyclist, was involved in a rear end collision with a van going in the same direction. The case was heard by the High Court which dismissed the action with costs on 16 April 1995. As the value of the subject matter of the action was below RM200,000, leave to appeal was required before the matter could be brought before the Court of Appeal. The plaintiff duly filed a notice of motion with an affidavit in support for leave to appeal on 24 May 1995 and served the same on the defendant's solicitors on 26 June 1995. The defendant filed an affidavit resisting the application on the grounds that: (i) the plaintiff's application was out of time; (ii) the application was misconceived as the proper application in the circumstances was one for an extension of time to file the application for leave; and (iii) the plaintiff had failed to file an affidavit explaining the delay.

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Held:
Per Mahadev Shankar JCA

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[1] The rules are clear that any such application must be made within the period limited for the filing of an appeal which, in the present case, was on or before 15 May 1995. In all such cases, it is for the solicitors to make sure that the documents reach the Registry in time.

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[2] When the plaintiff's solicitors received the original and service copies of the notice of motion on or about 24 May 1995 and in any case when they received the defendant's affidavit opposing the application, it should have been apparent to them that they were already too late and they should have come to court with convincing reasons for the delay and why they should be exculpated.

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[3] There were no good reasons shown as to why the delay had occurred and as the grounds furnished by the defendant were valid, the court upheld them and dismissed the plaintiff's application with costs.

Per curiam

[1] Had this application been made in time the result would have been the same. This was a case where the plaintiff was driving too fast and also following too closely the van in front of him with which he collided when that van moved towards the centre of the road in order to turn right. The issue here was a pure question of fact and the presumption was that the plaintiff had only himself to blame. This presumption was borne out completely by the police report and the sketch plan.

[Application dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Plaintif, seorang penunggang motosikal terlibat di dalam perlanggaran dengan sebuah van dari belakang semasa berjalan ke arah yang sama. Kes ini telah dibicarakan di Mahkamah Tinggi dan ditolak dengan kos pada 16 April 1995. Oleh kerana nilai gantirugi yang dipertikaikan adalah di bawah RM200,000 kebenaran untuk merayu adalah diperlukan sebelum tindakan itu boleh dibawa kepada Mahkamah Rayuan. Plaintif telah memfailkan notis usul bersama afidavit sokongannya untuk kebenaran merayu pada 24 Mei 1995 dan telah menyerahkannya ke atas peguamcara defendan pada 26 Jun 1995. Defendan telah memfailkan satu afidavit membantah permohonan tersebut atas alasan bahawa: (i) permohonan plaintif difailkan di luar had masa; (ii) permohonan tersebut salah difailkan kerana permohonan yang sesuai dalam keadaan itu adalah untuk perlanjutan masa untuk memfail permohonan untuk kebenaran merayu; dan (iii) plaintif telah gagal untuk memfail satu afidavit untuk menerangkan kelewatan tersebut.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Kaedah-kaedah adalah terang, iaitu sesuatu permohonan mesti dibuat di dalam had masa untik pemfailan satu rayuan yang mana, di dalam kes ini, adalah pada atau sebelum 15 Mei 1995. Di dalam semua kes yang relevan, adalah tanggungjawap peguamcara untuk memastikan dokumen-dokumen diterima oleh pejabat pendaftaran tepat pada masanya.

[2] Bila peguamcara plaintif menerima salinan-salinan asal dan untuk serahan notis usul pada atau sekitar 24 Mei 1995 dan di dalam bila-bila masa apabila mereka menerima afidavit defendan menentang permohonan tersebut, ia seharusnya sedar bahawa mereka telah di luar had masa dan mereka sepatutnya datang ke mahkamah dengan alasan teguh untuk kelewatan tersebut dan memberi sebab kenapa mereka seharusnya dilepaskan.

[3] Tiada alasan baik untuk menunjukkan kenapa kelewatan telah berlaku dan oleh kerana alasan yang diberi oleh defendan adalah sah, mahkamah telah menerimanya dan menolak permohonan plaintif dengan kos.

Per curiam

[1] Walaupun permohonan itu dibuat di dalam had masa keputusannya akan sama sahaja. Ini adalah kes di mana plaintif telah memandu terlalu pantas dan juga telah mengikuti van yang di hadapannya terlalu dekat dan telah melanggarinya apabila van tersebut bergerak ke tengah jalan untuk membelok kanan. Isu di sini adalah semata-matanya soalan fakta dan anggapannya adalah bahawa plaintif sendiri yang bersalah. Anggapan ini disokong sama sekali oleh lapuran polis dan pelan lakar.

[Permohonan ditolak dengan kos.]

For the appellant - G Ravishankar; M/s NM Tiong & Co
For the respondent - Joga Singh; M/s VP Nathan & Partners

[Appeal from High Court, Alor Setar; Civil Suit No: 23-30-92]

[Editor's note: this judgment was received on 9 April 1998.]

Reported by Cindy Chan

JUDGMENT

Mahadev Shankar JCA:

This is a motion for leave to appeal from a decision of the High Court and contingent upon such leave being granted for an extension of time to file the notice of appeal, memorandum of appeal and the appeal record.

The matter concerned a road accident on 4 December 1990. The plaintiff was a motorcyclist who had collided with the back of a van going in the same direction along Jalan Pegawai in Alor Setar towards Jalan Kuala Kedah.

On 16 April 1995 the case was heard. The High Court judge dismissed the action with costs. The value of the subject matter was below RM200,000 and therefore leave to appeal would have been required in order to bring the matter in the Court of Appeal.

The rules are quite clear that any such application must be made within the period limited for the filing of an appeal. In other words, the application should have been filed on or before 15 May 1995.

The plaintiff's solicitors affirmed an affidavit on 27 April 1995 and the same day settled the notice of motion.

For reasons not made clear to us this motion and the affidavit in support was only filed in the Court of Appeal Registry on 24 May 1995. Proof of this is furnished by the praecipe stamp which appears on the office copy of the notis usul.

Evidently the plaintiff's solicitors had not given any prior indication to the defendant's solicitors that they were contemplating an appeal. They served the notice of motion and the affidavit in support on the defendant's solicitors only on 26 June 1995.

The motion had by then been fixed for disposal on 10 July 1995.

On 6 July 1995 the defendant's solicitors filed an affidavit affirmed by the defendant in Penang on 5 July 1995. This affidavit made clear that the defendant's solicitors were resisting the application on two grounds:

(i) that when the notis usul reached the registry on 24 May 1995 the plaintiff was sadly out of time;

(ii) that the application for leave contained in the motion was misconceived because the proper application in the circumstances was one for an extension of time to file the application for leave itself;

(iii) that such an application would have to be supported by an affidavit showing good reasons why the application had not been made in due time; and

(iv) in any case there was no affidavit before the court explaining why the delay had occurred.

a At this juncture we should point out that when the plaintiff's solicitors received the original and service copies of the notice of motion, it should have been apparent to them on or about 24 May 1995 that they were already too late and had some explaining to do. In any case when they received the defendant's affidavit opposing their application they should have got their act together and *b* come to court with convincing reasons why they should be exculpated.

The situation that we were faced with on 10 July when the matter came up in open court was that no good reasons were shown to as to why the delay had occurred.

c We did not see any merit in the request of the applicant to be given time to file an affidavit in reply to the defendant's affidavit.

All the grounds furnished by the defendant opposing the motion were valid and we upheld them and dismissed the application with costs.

d We should add that had this application been made in time the result would have been the same. Attached to the defendant's affidavit are the police report and sketch plan. We satisfied that this was a case where the plaintiff was driving too fast and also following too close to the van in front of him with which he collided when that van moved towards the centre of the road in order *e* to turn right into Jalan Taman Selamat. The issue here was a pure question of fact and the presumption is that the plaintiff had only himself to blame. This presumption was borne out completely by the Police Report and the sketch plan.

Since July 1995 solicitors should have become perfectly aware of the *f* unreliability of courier services who are handed documents in order to expedite delivery but instead, particularly when it comes to filing court documents, they seem to take much longer than the due course of post. In all such cases it is for the solicitors to make sure that the documents have reached the registry in time.

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Our decision in this matter was unanimous and the reasons given above represent the views of all three of us that the application should be dismissed.

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